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LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS INCORPORATED; AND UNITED STATES TOBACCO COMPANY,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

The National Association of Convenience Stores ("NACS") respectfully submits this brief as amicus curiae in support of the Petitioners in accordance with the provisions of Supreme Court Rule 37. All parties have consented to this filing, and their written consents have been lodged with the Court.

INTEREST OF AMICUS CURIAE

Founded in 1961, NACS is a non-profit trade association representing more than 2,300 retail and 1,700 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience stores, and its retail members own more than 77,000 convenience stores worldwide. These retailers provide consumers with convenient locations to quickly purchase a wide array of products and services, including tobacco, soda, candy, baked goods and snack foods. Nearly 35 percent of the average convenience store's merchandise sales are tobacco products.

If allowed to stand, the decision below upholding the Massachusetts restrictions on tobacco "advertising" would leave most convenience stores in Massachusetts with no effective means to communicate with customers regarding the tobacco products they offer for sale. Extensive restrictions of this nature violate the First Amendment.

SUMMARY OF THE ARGUMENT

First, the Massachusetts regulations violate the First Amendment because they are "more extensive than is

necessary" to advance the State's interest in reducing underage tobacco use. The regulations essentially prohibit all outdoor advertising related to tobacco products in most of the State. These content-based speech restrictions effectively operate as a complete ban on convenience store communications with customers because the alternative communication options are prohibitively expensive and ineffective for small stores that rely heavily on pedestrian and drive-by traffic. (Point I.A.)

Moreover, because of the unique nature of convenience stores, the Massachusetts regulations effectively prohibit all dissemination of tobacco-related information, even inside their stores. That is because the regulations encompass any inside advertisement that can be seen outside the store. To reduce crime, however, the industry has adopted security design standards requiring that the inside of stores be fully visible from the outside. Shelving, product displays and counters are required to be placed below eye level to maximize visibility. These factors together render it virtually impossible for most convenience stores to disseminate tobacco-related information to their Massachusetts customers. They also violate the First Amendment rights of those customers to receive that information. (Point I.B.)

Accordingly, the challenged provisions create a significantly greater impact on convenience stores than they do on other retailers of tobacco products that the State did not even consider. (Point I.C.) There also are less speech-restrictive alternatives available that would more directly advance the State's asserted interest in reducing under age smoking. (Point I.D.)

Second, there is no evidence that the challenged regulations directly advance the asserted state interest in any material way.

There is no logical relationship between posting advertisements five feet above the floor and the State's asserted interest. Even the reports the State purports to rely upon to justify these restrictions acknowledge the lack of any evidence suggesting a relationship between advertising and tobacco consumption. To the contrary, the overwhelming majority of studies conclude that the only impact of tobacco advertising is on inter-brand competition. (Point II)

Finally, the challenged regulations impermissibly restrict the political speech of tobacco companies and their supporters. Such content-based restrictions on political speech are impermissible. (Point III)

ARGUMENT

In an effort to reduce underage tobacco use, the Commonwealth of Massachusetts enacted three sets of regulations that, together, effectively eliminate the ability of most Massachusetts convenience stores to communicate information related to tobacco products to their customers, including those who have a lawful right to purchase such products.[1]

Although the parties disagree as to the appropriate First Amendment test under which these extensive content-based

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[1] The challenged provisions that apply to cigarettes and smokeless tobacco are 940 C.M.R. §§ 21.04(5)(a) & (b), 21.04(2)(c) & (d). The provisions applying to cigars are 940 C.M.R. §§ 22.06(5)(a) & (b), 22.06(2)(c) & (d).

speech restrictions should be evaluated,[2] the challenged Massachusetts regulations fail to pass muster even under the more lenient *Central Hudson* standard. *See Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980). In *Central Hudson*, the Court established a four part test to determine the constitutionality of content-based restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

I. THE CHALLENGED MASSACHUSETTS SPEECH RESTRICTIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY ARE "MORE EXTENSIVE THAN IS NECESSARY."

Under the *Central Hudson* test, a content-based state law that restricts commercial speech is more extensive than is necessary

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[2] Petitioners contend that a strict scrutiny standard applies to the Massachusetts regulations at issue, while the Respondent contends that the lower standard set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980) applies. The restrictions on political speech in particular indicate the need for a strict scrutiny standard of review.

if the State does not employ "a means narrowly tailored to achieve the desired objective." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). To satisfy this requirement, there must be a fit between the challenged provisions and the asserted governmental interest that "is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Id.* (*quoting In re R.M.J.*, 455 U.S. 191, 203 (1982)). The extensive restrictions imposed by the challenged Massachusetts regulations do not satisfy this fundamental constitutional requirement.

A. The Challenged Outdoor "Advertisement" Ban Prohibits Most Convenience Stores From Communicating Tobacco-Related Information To Prospective Customers In Massachusetts.

The first set of challenged regulations prohibit all outdoor "advertising" related to tobacco products – including in-store "advertising" that can be seen from outside the store – "within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." 940 C.M.R. §§ 21.04(5)(a) (cigarettes and smokeless tobacco), 22.06(5)(a) (cigars). The regulations cover between 87 and 91 percent of the land area of the three largest cities in Massachusetts. *See* Petition For A Writ Of Certiorari, *Lorillard Tobacco Company v. Reilly* at 5 (U.S. S. Ct. 2000) (No. 00-596). Convenience stores are typically located in highly populated areas. The vast majority of Massachusetts' convenience stores will thus be subject to this tobacco products "advertisement" ban.

The regulations also define the term "advertisement" quite broadly, dictating that it includes

> any picture, logo, symbol, motto, selling message, graphic display, visual image, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarette or smokeless tobacco product. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door mats[.]

940 C.M.R. § 21.03; *see also* 940 C.M.R. § 22.03 (same for cigar "advertisement").

All on-site outdoor advertising by almost all Massachusetts convenience stores is thus banned by the regulations. The only possible alternatives for outdoor convenience store advertisements are off-site billboards located outside of the zone covered by the challenged regulations, and newspaper or magazine print advertisements. As the First Circuit recognized, however, the available alternatives under the regulations are "cost-prohibitive for many vendors of tobacco products such as small groceries and convenience stores." *Consolidated Cigar Corporation v. Reilly*, 218 F.3d 30, 52 (1st Cir. 2000). Most convenience stores will have no ability to inform potential customers that they even sell tobacco products.

Print and outdoor advertisements far removed from the site of the convenience store and outside the reach of the Massachusetts regulations are not only prohibitively expensive for most convenience stores, they also are wholly ineffective substitutes for on-site advertising. One key element of the business of any convenience store is its location – near heavily populated areas and other locations with a large volume of

pedestrian traffic. Many convenience stores also offer gasoline products.[3] For both pedestrians and gasoline customers, on-site outdoor advertising is essential to communicate information – including special offers – about available products.[4]

This Court has specifically held that laws, such as the Massachusetts outdoor advertisement ban, that require the incursion of greater expense to communicate information in a less effective manner are constitutionally suspect. In *Linmark Assocs., Inc. v. Willingboro Township*, 431 U.S. 85 (1977), the Court invalidated a law prohibiting the placement of "For Sale" signs from being placed in front of houses because the restriction did not leave homeowners with satisfactory alternatives to communicate their intention to sell their homes because:

> [t]he options to which sellers realistically are relegated – primarily newspaper advertising and listing with real estate agents – involve more cost and less autonomy than "For Sale" signs[,] are less likely to reach persons not deliberately seeking sales information and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold.

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[3] Approximately 76 percent of convenience stores operated by NACS members also sell gasoline.

[4] The "tombstone" provisions struck down by the District Court that would have permitted the disclosure of information that tobacco products were available would have been an insufficient substitute because the size and style restrictions made it highly unlikely that consumers would be able to see the information, and did not enable retailers to communicate other valuable information such as types, brands, and promotional offerings.

431 U.S. at 93 (citations omitted). The same is true here.

B. The Challenged "Advertisement" Provisions Effectively Prohibit Most Convenience Stores From Communicating Any Tobacco-Related Information To Customers Inside Stores In Massachusetts.

In addition to the provisions discussed above that ban the display of any tobacco-related information inside a retail establishment that can be seen from outside the store, the challenged provisions also require that any in-store tobacco-related advertisements be at least five feet above floor level,[5] and that all tobacco products be kept where they are accessible only to store employees.[6] As explained below, these requirements collectively operate to effectively ban the disclosure of any information about tobacco products.

Convenience stores are typically open 24 hours a day and are concentrated in urban areas. As such they are prime targets of crime. In an effort to address this perplexing problem and to make convenience stores less attractive crime targets, NACS developed a set of security recommendations in 1987 based on research funded by the National Institute of Justice. *See* NACS, *Robbery and Violence Deterrence Manual* at 4 (2000) ("NACS *Manual*").[7] The NACS security recommendations were widely distributed and have become the industry standard. Indeed, when the United States Department of Labor's Occupational

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[5] 940 C.M.R. §§ 21.04(5)(b), 22.06(5)(b).

[6] 940 C.M.R. §§ 21.04(2)(c) & (d), 22.06(2)(c) & (d).

[7] A copy of this most recent version of the NACS *Manual* has been lodged with the Court.

Safety and Health Administration ("OSHA") issued its own set of recommendations in 1998, it incorporated almost all of the primary components of the NACS recommendations. *See* OSHA, *Recommendations for Workplace Violence Prevention Programs In Late-Night Retail Establishments* (1998) ("OSHA *Recommendations*").

According to research used by NACS to develop its recommendations, ensuring good visibility and maintaining good lighting are validated strategies to prevent crime. NACS *Manual* at 7. Visibility is important because "persons outside the store, including police on patrol, should be able to see into the store." *Id.* at 15. In particular, "[t]he customer service and cash register areas should be visible from outside the store. Shelves should be low enough to ensure good visibility throughout the store." *Id.* at 15. These measures also are essential to ensure that employees have "an unobstructed view of the street, clear of shrubbery, trees or any form of clutter that a criminal could use to hide." *Id.* at 15. And, importantly, to maintain visibility, NACS instructs retailers to "not keep product displays higher than eye level." *Id.* at 20.

OSHA concurs with NACS' finding that the physical design of convenience stores can help reduce the risk of robbery and violence. OSHA *Recommendations* at 6. Like NACS, OSHA instructs that convenience stores should be designed so that

> [f]irst, employees should be able to see their surroundings, and second, persons outside the store, including police on patrol, should be able to see into the store. . . . The customer service and cash register areas should be visible from outside the establishment. Shelves should be low enough to assure good visibility throughout the store.

Id. at 6.

The NACS (and OSHA) store-design recommendations have become the convenience store industry standard. From 1993 to 1997, convenience store robberies were reduced by 24 percent. NACS *Manual* at 4. The experience of specific stores that have adopted the design standards has been even more impressive. Adherence to the recommendations in 7-Eleven stores has, for example, resulted in a 70 percent decrease in robberies chain-wide. *Id.*

The challenged regulations effectively prohibit convenience stores that are in compliance with the NACS (and OSHA) store design security standards from conveying any information whatsoever to their customers about the tobacco products they offer. Massachusetts regulations require that any in-store tobacco information be placed at least five feet above floor level. Because of the design features discussed above, virtually all tobacco information displayed within the store above the five foot limit would be seen from outside the store, which would violate Massachusetts' ban on outdoor advertisements. Taken together the outdoor advertising ban and the five foot requirement prohibit convenience stores from communicating tobacco-related information.

The Massachusetts tobacco "advertisement" prohibitions also violate the constitutional rights of consumers – lawful purchasers of tobacco-related products – who have an interest in receiving the tobacco information that convenience stores seek to convey. The First Amendment protects the right of such consumers to receive tobacco-related information –

> the Court's decisions involving corporations in the business of communication or entertainment are not

> only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). The Massachusetts tobacco "advertisement" restrictions severely – and impermissibly – restrict the dissemination of information to consumers about brands and types being offered and their prices.

C. The Challenged Tobacco "Advertisement" Restrictions Have A Disparate Impact On The First Amendment Rights Of Convenience Stores.

The Court has made clear that laws that "select among speakers conveying virtually identical messages are in tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 194 (1999). The challenged Massachusetts provisions do exactly that.

Convenience stores account for a little more than 50 percent of all sales of cigarette cartons and single packs. Management Science Associates, *Cigarette Unit of Measure - Cartons*, App. 1a.[8] The bulk of the remaining sales are made by supermarkets, mass merchandisers, specialty tobacco stores and drug stores. *Id.*[9]

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[8] Convenience stores accounted for approximately 51.6% of such sales in 1998, and 54.4% in 1999. *See id.*

[9] Approximately 41.6% in 1998 and 39.1% in 1999. *Id.*

As discussed above, the outdoor advertisement ban prohibits convenience stores from disseminating tobacco-related information in an affordable and effective manner. It also essentially is impossible for convenience stores that endeavor to adhere to the NACS (and OSHA) store design security recommendations to communicate tobacco product information inside the store and maintain compliance with the Massachusetts restrictions.

Supermarkets, mass merchandisers, specialty tobacco stores and drug stores, in contrast, can generally comply with the outdoor advertisement prohibitions by placing advertisements in newspapers and magazines. These other retailers also do not generally employ the types of security strategies that NACS recommends for its members. The challenged regulations thus do not effectively ban these other retailers from disseminating tobacco product information in their stores.

The State's interest in reducing underage tobacco use provides no support for placing greater restrictions on the speech of convenience stores than on that of other retail outlets. For example, there is no evidence that minors more frequently view the in-store advertisements of convenience stores – either from outside or inside the stores – than they view the in-store advertisements of supermarkets or drug stores. In fact, given the size of many supermarkets and drug stores, exactly the opposite is likely to be true.[10]

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[10] There also is no evidence that convenience stores are less likely to enforce laws prohibiting tobacco sales to minors. Based on FDA compliance checks conducted between 1997 and 2000, the average rate of violation of FDA regulations regarding identification checks and minimum ages for purchasing tobacco at all retail outlets was 26%. The rate for free-standing convenience stores was 23% and the rate for convenience stores attached to gasoline stations was 27%. Other major retail outlets

Moreover, there is no evidence that the Massachusetts Attorney General even considered this impact on convenience stores in the course of promulgating the tobacco advertisement prohibitions. The failure to carefully calculate such costs associated with restrictions on commercial speech itself demonstrates that there is not a reasonable fit between the restrictions and the asserted State interest. *Greater New Orleans*, 527 U.S. at 188; *Fox*, 492 U.S. at 480.

D. Other Less Restrictive Alternatives Would More Directly Advance The State's Asserted Interest.

The existence of less severe speech-restrictive alternatives also is evidence that challenged content-based regulatory restrictions are not sufficiently tailored as *Central Hudson* requires. In striking down a federal prohibition on the advertisement of the alcohol content of beer in *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995), the Court concluded that "the availability of . . . options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the challenged speech restriction] is more extensive than necessary." 514 U.S. at 491.[11]

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experienced the following violation rates: supermarkets 25%, drug stores 24%, general merchandisers 25%, and tobacco stores 23%. FDA Compliance Checker, www.fda.gov/opacom/campaigns/tobacco/compliancechecker.html.

[11] The less speech-restrictive alternatives identified by the Court that would advance the government's interest in avoiding alcohol content wars between brewers included "directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength . . . or limiting the labeling ban only to malt liquors." 514 U.S. at 490-91.

Similarly, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court invalidated Rhode Island restrictions on price advertising because there were less speech-restrictive alternatives available. 517 U.S. at 507. The alternative measures that the *Liquormart* Court found were "perfectly obvious . . . alternative forms of regulation that would not involve any restriction on speech [and] would be more likely to achieve the State's goal of promoting temperance" included the maintenance of higher prices "either by direct regulation or by increased taxation" and "educational campaigns focused on the problems of excessive, or even moderate, drinking[.]" 517 U.S. at 507.

Massachusetts could employ similar non-speech restrictive strategies – raising the price of tobacco products through regulation or taxation and engaging in increased education campaigns – and it could more strictly enforce current laws against sales of tobacco products to, and possession or use of tobacco products by, minors. Indeed, the Surgeon General has specifically found that such efforts do advance the asserted interest of reducing teen smoking:

> Communitywide efforts that include tobacco tax increases, enforcement of minors' access laws, youth-oriented mass media campaigns, and school-based tobacco-use prevention programs are successful in reducing adolescent use of tobacco.

U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* at 6 (1994). In addition, the State also could limit marketing in less speech-restrictive ways by prohibiting only those marketing efforts intentionally directed toward minors or placing advertising restrictions only on retailers that do not

adequately comply with laws against sales to minors. In promulgating the challenged regulations, the Massachusetts Attorney General ignored precisely the kind of less speech-restrictive alternatives that the Court identified in *Coors* and *Liquormart*.

* * * *

Like the restrictions struck down by the Court in *Greater New Orleans*, *Coors*, and *Liquormart*, the Massachusetts regulations are not sufficiently tailored to the State's asserted interest in reducing underage tobacco use to survive scrutiny under *Central Hudson*.

II. THE MASSACHUSETTS PROHIBITIONS DO NOT ADVANCE THE ASSERTED STATE INTEREST.

Central Hudson dictates that restrictions on commercial speech are unconstitutional unless they directly advance the State's interest to a material degree:

> It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) (citations omitted).

The need for the State to demonstrate that its restrictions on commercial speech will directly and materially advance its interests is "particularly great [here] given the drastic nature of its chosen means – the wholesale suppression of truthful, nonmisleading information" by convenience stores. *Liquormart*, 517 U.S. at 505. For that reason, the *Liquormart* Court required the State of Rhode Island to demonstrate that its ban on alcohol price advertising would "*significantly* reduce alcohol consumption." *Id.* at 505 (emphasis in original).

The State argued below that this aspect of the *Liquormart* Court's opinion does not apply here because the challenged Massachusetts regulations do not effect as complete a restriction on advertising as the Rhode Island ban on price advertising. Brief of Defendant-Appellee at 46-47, *Consolidated Cigar Corporation v. Reilly*, 218 F.3d 30 (1st Cir. 2000) (No. 00-1117) ("Mass. App. Br."). As applied to convenience stores, however, the Massachusetts regulations are an even more "drastic" restriction on speech. They prohibit all advertising – not just price advertising – inside and outside convenience stores, leaving convenience stores with no adequate alternative to disseminate to customers information about tobacco products.

The State cannot satisfy this high burden here because there is no evidence that the challenged regulations advance the State's interest in reducing underage tobacco use in any way. Indeed, the available evidence on this point is to the contrary.

The five foot rule bears no logical relationship to the reduction of underage tobacco use. The Massachusetts Attorney General justified the imposition of the five foot rule on the basis of the eye level of minors. *See* Mass. App. Br. at 8. There is

absolutely no evidence, however, that minors in a convenience store are unable to look up to view advertisements.

Moreover, the regulations include mistaken assumptions about the height of the minors with whom the State is concerned. Underage smoking is a problem almost exclusively associated with teenagers, not all minors. "Up to age 20, current cigarette smoking rates increase steadily by year of age, from 2.2 percent at age 12 to 43.5 percent at age 20." Substance Abuse and Mental Health Services Administration, *1999 National Household Survey on Drug Abuse*, § 2.3 (2000). The State's interest in protecting minors from the health effects of smoking therefore increases as minors reach their later teenage years. But the average boy or girl in the United States surpasses the height of five feet before his or her 13th birthday. U.S. Centers for Disease Control (CDC), *Growth Charts: United States,* www.cdc.gov/nchs/about/major/nhanes/growthcharts/clinical_charts.htm. In fact, the growth curves for both boys and girls level out during the teenage years – the average girl grows to within 1 inch of her full adult height before she turns 14 and the average boy reaches the height of the average adult woman around his 14th birthday. *Id.*

The five foot rule thus operates not to keep tobacco information from the view of minors, but, as applied to convenience stores, instead acts to keep it from everyone. The Court has repeatedly held that States cannot, in the name of protecting children, limit adults to "reading only what is fit for children." *Butler v. State of Michigan*, 352 U.S. 380, 383 (1957); *see also Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727, 759 (1996) ("No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify reduc[ing] the adult population . . . to . . . only what is fit for

children.") (citations omitted); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 131 (1989)("Under our precedents, [the challenged regulation] . . . has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear").

As a more general matter, there is no evidence of a link between advertising and tobacco consumption. As even former Surgeon General C. Everett Koop has conceded, "[t]here is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption." U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: A Report of the Surgeon General* at 516 (1989). Other research in this field has failed to demonstrate that advertising causes minors to smoke. The 1987 *Economic Report of the President*, for example, makes clear that "there is little evidence that advertising results in additional smoking. As with many products, advertising mainly shifts consumers among brands." *Id.* at 186. Another prominent analyst also has remarked on the repeated failure to identify a link between advertising and tobacco use:

> Overall, the evidence that advertising plays an important role in getting people to smoke is not very convincing. In 1991, the economist Thomas Schelling, former director of Harvard's Institute for the Study of Smoking Behavior and Policy, said: "I've never seen a genuine study of the subject . . . . Most of the discussion that I hear – even the serious discussion – is about as profound as saying, 'If I were a teenage black girl, that ad would make me smoke.' I just find it altogether unpersuasive . . . . I've been very skeptical that advertising is important in either getting

> people to smoke or keeping people smoking. It's primarily brand competition."

Jacob Sullum, *For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health* at 106 (1998) (citations omitted).[12]

In its brief to the First Circuit, the State nevertheless pointed to two principle sources as evidence that restricting tobacco-related advertising would reduce underage smoking. *See* Mass. App. Br. at 37-38 (discussing U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994) ("1994 Surgeon General Report"), and 1996 Rulemaking Findings made by the Food and Drug Administration, 61 Fed. Reg. 44,396 (1996)). Both sources, however, addressed the effects of advertising on billboards, in print and in other media. The challenged Massachusetts regulations, in contrast, effectively prohibit the dissemination of any tobacco-related information by most convenience stores, including visibly displaying tobacco products in their packaging, listing the prices of tobacco products offered for sale, or in any other way informing customers that tobacco products are available. The State has not identified any evidence that blanket prohibitions on the dissemination of tobacco-related information such as these reduce underage tobacco use in any way.

Moreover, both studies identified by the State affirmatively disclaim the existence of any evidence linking broader

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[12] *See also, e.g.*, C. McDonald, *Children, Smoking and Advertising: What Does the Research Really Tell Us*, 12 Int'l J. of Advertising 279 (1993) ("There is no evidence in any of the studies to suggest that, if advertising were banned, it would make the least difference in the propensity of children to smoke").

advertising efforts with an increase in teen smoking. In his 1994 report, for example, the Surgeon General found that, "[t]o date, [] no longitudinal study of the direct relationship of cigarette advertising to smoking initiation has been reported in the literature." 1994 Surgeon General Report at 188.

In its 1996 rule-making proceeding, the FDA also concluded that none of the studies it had examined were

> sufficient to: (1) Establish that advertising has an effect directly causing minors to use tobacco products; (2) determine directionality – that is, did advertising cause the observed effect, or are smokers more observant of advertising . . . or; (3) define terms or disprove the influence of peer pressure in smoking behavior.

61 Fed. Reg. at 44,476 (citation omitted).

The Massachusetts regulations effect a complete ban on point of sale advertising for convenience stores. Even the best evidence presented by the Massachusetts Attorney General does not support the efficacy of a complete ban on in-store advertising as a way to reduce underage smoking. The State has thus failed to sustain its burden of demonstrating that the restrictions it places on speech directly advance its asserted interest in reducing teen smoking in any material way.

III. THE CHALLENGED REGULATIONS ALSO IMPERMISSIBLY RESTRICT POLITICAL SPEECH.

Tobacco companies occasionally display political advertisements regarding policy issues. The R.J. Reynolds

Tobacco Company has, for example, initiated several national campaigns criticizing government smoking policies. One R.J. Reynolds advertisement asked the question –

> Why do politicians smoke cigars while taxing cigarettes?

in front of a backdrop consisting of the colors, logo and a pack of Winston cigarettes with slogans for the brand. App. 2a. The advertisement was a response to the federal government 's plan to significantly increase the cigarette tax, at the same time that then President Clinton was photographed smoking a cigar after the Yugoslavian rescue of an American fighter pilot.

A second R.J. Reynolds advertisement read –

> Even Communists are free to smoke.

in front of the same backdrop. App. 3a. These advertisements are political statements regarding government decisions to tax and otherwise regulate cigarettes.

Such political statements clearly fall within the definition of "advertisements" that are subject to the challenged regulations. The regulations encompass "any oral, written, graphic, or pictorial statement or representation . . . the purpose or effect of which is to promote the use or sale of the product." 940 C.M.R. § 21.03. In addition, "[a]dvertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display, visual image, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarette or smokeless tobacco product." *Id.*

"The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*quoting Roth v. United States*, 354 U.S. 476, 484 (1957)). The First Amendment's strong protection of political expression reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964).

Any regulation that significantly impairs political speech may be upheld only if it is able to "survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Buckley*, 424 U.S. at 64. Under this standard, the State has the burden of identifying an interest for imposing the regulation that is "compelling." *Elrod*, 427 U.S. at 362; *Buckley*, 424 U.S. at 94; *Bellotti*, 435 U.S. at 786. The State also must "use means closely drawn to avoid unnecessary abridgement of First Amendment freedoms." *Buckley*, 434 U.S. at 25. The Massachusetts regulations are far too restrictive to meet this exacting standard.

CONCLUSION

For the foregoing reasons, NACS urges this Court to reverse the decision of the First Circuit and invalidate the challenged provisions of the Massachusetts regulations.

Respectfully Submitted,

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